IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No. 1086 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE ANANT S.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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PUSHPAK NIRANJANBHAI KAHAR - Applicant(s)

Versus

DEPUTY COMMISSIONER OF POLICE & 1 - Respondent(s)

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Appearance :

MR NM KAPADIA for Applicant(s) : 1,

DS AFF.NOT FILED (R) for Respondent(s) : 1,

PUBLIC PROSECUTOR for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE ANANT S.DAVE

Date : 05/10/2005

ORAL JUDGMENT

1. This petition under Article 226 of the Constitution of India challenges the order of externment dated 21.04.2005 passed by the respondent no.2 and also the order passed in appeal dated 8th August, 2005 by respondent no.1 confirming the order of externment as illegal, unreasonable and violative of Article 19 (1) (d) and 21 of the Constitution of India.

2. The facts, noticed by this Court while deciding this petition are as under:-

That show cause notice dated 21.10.2004 was given to the petitioner by respondent no.1, the Competent Authority under Section 59 of the Bombay Police Act, 1951, which revealed that

C.R.No.131 of 2004 is registered with Rander Police Station for the offences punishable under Sections 323, 325, 504 and 114 of Indian Penal Code and also under Section 135 of the Bombay Police Act. In the said show cause notice statements of two secrete witnesses have also been recorded which narrate about the criminal activities of the externee indulging into intimidation, trying to extort money and thus creating an atmosphere of terror and fear affecting law and order situation at public place. Such activities of the petitioner have also resulted into closer of shops and since no other remedy is effective, the power under Section 56 (a) and (b) are exercised. It was further stated that petitioner is to be externed from the city area of Surat and adjoining district of Surat, Navsari, Valsad as

well, for a period of two years and the petitioner was asked to show cause, as to why such order should not be passed against him.

3. Reply was submitted by the petitioner on 7th November, 2004 and written and final submissions on April, 2005, alongwith various pronouncement of law on externment by the Hon'ble Gujarat High Court in the reply. It was specifically submitted that there is only solitary case registered against the petitioner and the statements of witnesses, which narrate about the incident do not refer to a specific period. It was also submitted that the dates, referred to in one of the crimes i.e. 15th August, 2004 and 28th August, 2004 on which day the petitioner was not available, through out this period,

since he had gone to Shirdi. It was submitted that there were no criminal antecedent and in support of his defence, four witnesses were examined by the petitioner stating about law abiding nature of the petitioner.

4. However, the authority, respondent no.1 herein passed the order on 21st April, 2005 and almost repeated what was stated in the show cause notice and after referring to the statement of two witnesses narrating about the criminal activities of the petitioner and on perusal of the records, the concerned authority externed the petitioner for a period of one year from the city of Surat and also from the adjoining districts of Surat Rural and Navsari. It is pertinent to note that while passing the order the externing

authority has relied upon and considered the registration of offences against the petitioner under Section 323, 325, 504 and 114 of Indian Penal Code and under Section 135 of the Bombay Police Act, 1951 while referring to the above offences the Exeterning Authority has described that offences fall under Chapter 16 and 17 of the Code and therefore, powers under Section 56 (a) and 56(b) are required to be exercised.

5. That being aggrieved and dis-satisfied by the order dated 21.04.2005 passed by the respondent no.1 an appeal was preferred under Section 60 of the Act before respondent no.2 raising various grounds and a specific plea was raised that the offence relied upon by the externing authority to bring the activities of externee within the

purview of Chapter 16 and 17 of the Code, there was total non-application of mind on the part of the externing authority in exercise of power under Section 56(b) of the Constitution of India, since all offences do not fall under Chapter 16 and 17 of the Code, therefore, the order of externing authority suffers from vice of non-application of mind and the order passed by the said authority is unreasonable, arbitrary and violative of Article 14, 19 and 21 of the Constitution of India. Interalia it was submitted before the appellate authority that there was no justification in passing the order of externment externing the petitioner from adjoining districts also for a period of one year and in support of the above submissions caselaw was also relied upon, as pronounced by the Hon'ble

Gujarat High Court.

However, the appellate authority after recording the grounds of appeal and after perusing the record found that C.R.No.131/2004 registered for the offences u/S. 323, 325, 405 and 114 of I.P.C. and also under Section 135 of the Bombay Police Act, 1951 was registered against the petitioner and two secrete witnesses have stated about criminal and anti-social activities of the petitioner. Since the concerned authority has given sufficient opportunity to represent the case and the written representation of the defense submitted by the externee is also considered by the competent authority the order impugned was found in accordance with law and the appellate authority observed that the submission

about offences relied upon by the competent authority do not fall under Chapter 16 and 17 of IPC, have no relevance. Therefore, the order of competent authority was confirmed.

6. Being aggrieved and dissatisfied with the orders dated 21.04.2005 passed by the respondent no.1 and dated 08th August, 2005 passed by the respondent no.2 in confirming the order of the competent authority, the learned advocate submitted that the order of the competent authority dated 21.04.2005 is beyond the scope of show cause notice, since in the show cause notice dated 20th October, 2004 there was no mention about consideration and relevance of offences registered against the externee vide C.R.No.131/04. Therefore, according to the learned advocate for the petitioner,

no opportunity was given to the petitioner to raise his defense. That the offence registered qua C.R.No.131/04 fall under Chapter 16 and not under Chapter 17 of IPC. According to the learned counsel for the petitioner offences under Sections 323, 325 will be under Chapter 16, since the said offences are against human body while offences under Section 504 and 114 do not fall either under Chapter 16 or Chapter 17. Offence under Section 504 is under Chapter 22 while under Section 114 falls under Chapter 5 of the IPC. While section 135 of the Bombay Police Act registered against the detenue speaks for itself and it is altogether under a different statute. Therefore, he has submitted that this is a case of non-application of mind to the relevant facts than the powers exercised by the

Competent Authority stands vitiated and order impugned requires to be quashed and set aside.

However, he has also vehemently submitted that the concerned competent authority as well as the appellate authority have paid no heed to the pronouncement of law on the subject, though relied upon and submitted to the concerned authorities in support of arguments and both the authorities have ignored the law of the land and continued to apply mind mechanically. Therefore, according to the learned advocate for the petitioner, in such circumstances in spite of appraisal about pronouncement of law on the subject by the highest Court of the State, non-consideration of the same by the concerned authority amounts disregard to the rule of law by the

authority, while exercising powers under the Statute. He has also relied upon the decision reported at 1996 (1) GLH 53 and 1986 GLH (N.O.C.) 5 and submitted that the orders impugned required to be quashed and set aside as arbitrary, unreasonable exercise of powers depriving the petitioner of his valuable right of movement in the territory as guaranteed under Article 19 of the Constitution of India.

7. The learned A.P.P. Mrs. Hansa B. Punani has submitted that the concerned authority is justified in passing the order of externment since the criminal activities carried out by him in the residential area was sufficient enough to warrant exercise of powers under Section 56(b) of the Act. According to her, apart from the cases in which the

petitioner was acquitted by the court, there was adequate and enough materials for with the Competent Authority to arrive at the conclusion that except the remedy of externment under Section 57(b), no other remedy is available so as to prevent the externee from indulging into such activities. She has further submitted that there was no statutory obligation upon the appellate authority to give detailed and reasoned order, particularly the record of the whole case was perused and considered and thereafter the order under appeal was passed. Therefore, according to her, no interference is called for and the decision of the externing authority as well as of appellate authority do not require any interference by this Court in exercise of powers under Article 226 of the Constitution of India.

8. Considering the rival submissions and perusing the relevant records including affidavit in reply, I am inclined to uphold the arguments and submissions of the learned counsel for the petitioner, since it is evident from the order of the Competent Authority that the concerned authority has not given any reference or indication about exercise of powers under Section 56 of Bombay Police Act, 1951 to the petitioner that the offences registered against the petitioner attract or they are the offences covered under Chapter 16 and 17 of the Penal Code. To this extent the petitioner is deprived of his right to represent his case and canvass the defense in accordance with the principles of natural justice. The facts or allegations which were not forming

the part in the show cause notice and surface in the order of the Competent Authority for arriving at the conclusion that the case is made out to extern the petitioner, at least require, mention in the notice of show cause, so that the person concerned can make effective representation on such issue. In the present case as rightly submitted by the learned counsel for the petitioner that only offences under Section 323 and 325 fall under Chapter 16 of the IPC while rest of the offences are under Chapter 22 and Chapter 5 of the Code while last offence is under the Bombay Police Act, 1951. Therefore, reliance is placed on the decision of this Court as reported in 1991 (GLH) 425 is aptly applicable. In the said decision in Para-6 of the judgment the learned single judge has held that mentioning of various offences

by the Competent authority, which did not fall either under Chapter 16 or 17 exhibited mechanical approach of the authority and rendered the order of externing authority illegally. Even in para-7 the learned Single Judge held that the order of appellate authority also suffers from vice of in the facts of the present case when there is a reference of offence registered under Sections 504 and 114 of Indian Penal Code and also under Section 135 of the Bombay Police Act falling under Chapter 16 and 17 of the Act, 1951 reflect total non-application of mind and therefore, the order passed on such factors is nothing but case of arbitrary and unreasonable exercise of powers in violation of Articles 14, 19 and 21 of the Constitution of India, and therefore, the impugned orders are

required to be quashed and set aside. However, another submission of the learned counsel for the petitioner about approach of the externing authority as well the appellate authority about non-consideration of pronouncement of law on externment in exercise of powers and the relevant criteria and principles for exercise of powers under Section 56 or 57 of the Bombay Police Act, 1951 speak for the status of administration in the State as early as in 1996 in the reported decision in the case of Jorubhai, Sub-divisional Magistrate, Dholka 1996(1) GLH P-53. This Court lamented the approach of the authority in dealing with the appellants in exercise of quasi-judicial power under the Statute and particularly cases of involvement of right guaranteed under article 21 of the Constitution of India.

A reasonable hope was expressed that the appellate authority will act with responsibilities with a view to see that the responsibility cast upon it is diligently and conscientiously discharged. It seems from the record of two cases dealt with by this Court today, the above hope of this Hon'ble Court has remained just hope and the authorities have not learnt a lesson about, which has resulted into un-avoidable litigation before this Hon'ble Court.

Since the orders impugned are quashed and set aside on the ground of non-application of mind by the concerned authority and failure by the appellate authority to deal with submissions as raised in the appeal, at this stage no further orders required to be passed and

therefore, the orders 21.04.2005 passed by the respondent no.1 and dated 8th August, 2005 passed by the Appellate authority, being devoid of reasons, are arbitrary and unreasonable and therefore violative of Articles 14,19 and 21 of the Constitution of India, are hereby ordered to be quashed and set aside. Petition is allowed. Rule is made absolute accordingly. Direct Service is permitted.

(ANANT S. DAVE, J.)

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